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Conflict of Laws--Limitation of Actions-- "Borrowing" Statute

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seeable as a result of the defendant's acts, but foreseeability is not always required in proximate cause.¹⁵ Hence, it is plausible that a causal relation *did* exist.

Other jurisdictions have refused to take the question of proximate cause from the jury when reasonable men would differ in their interpretation of the causal facts,¹⁶ and it is submitted that this is the action that the Kentucky Court of Appeals should have taken. The appellate court should not have reversed the lower court on the basis of proximate cause because the facts of the instant case did not constitute such a clear lack of a causal relation that the upper court could say as a matter of law there was no proximate cause.

There are two conclusions to be established from the foregoing analysis of the *Graves* case in light of the modern view that criminal responsibility may be imposed for causing death by fright. First, the court should have placed more emphasis (if procedurally possible)¹⁷ on the *nature* of the defendant's act. By finding the act not to be *dangerous*, the court could have reached the same result and could have avoided the vexing problem of proximate cause. Second, since the court did review the causal aspect of the case, it should not have ruled as a *matter of law* that there was no causal connection between the act and the death. Such a problem was for the jury, and the finding of the circuit court on the *issue* of proximate cause should not have been disturbed.

The court's ultimate decision seems to be correct, but its analysis seems questionable since the case should have turned on the *nature* of the act rather than the *causal* relationship.

LUTHER HOUSE

CONFLICT OF LAWS—LIMITATION OF ACTIONS—"BORROWING" STATUTE—Plaintiff, a resident of New Jersey, brought an action against defendant Kentucky corporation in a United States District Court in Kentucky, for recovery of damages for personal injuries arising out of an accident that occurred in New Jersey on March 14, 1952. The Kentucky statute of limitation for personal injuries is one year, whereas in New Jersey the period is two years. Complaint was filed on March 13, 1954. The court overruled defendant's motion to dismiss the action, based on the Kentucky statute of limitations, and in accord with past Kentucky decisions, held that the Kentucky "borrowing"

¹⁵ RESTATEMENT, TORTS, sec. 435 (1934); PROSSER, TORTS, sec. 48 (1941).

¹⁶ In *Re Heigho*, *supra* note 5.

¹⁷ *Supra* note 10.

statute lengthens as well as shortens the limitation period of the forum, depending upon the foreign limitation statute. *Albanese v. Ohio River—Frankfort Cooperage Corp.*, 125 F. Supp. 333 (W. D. Ky. 1954).

The common law rule was that statutes of limitation were to be treated as procedural, affecting the remedy and not the right, and that therefore the limitation of the forum controlled.¹ Tolling provisions in statutes of limitation, however, permitted plaintiffs to "shop around" to find a forum in which an action would not be barred, even though it would be barred at home.² Such shopping around induced most states to adopt so-called "borrowing" statutes, which provided generally that if the cause of action was barred where it arose, then it would be barred in the forum.³ The vast majority of the states with such borrowing statutes have construed them to borrow only to the extent of providing an *additional* limitation on the forum's limitation period.⁴ Thus, the *lex fori* would continue to rule, as it did under the common law, if it provided a *shorter* period of limitation than did the jurisdiction in which the cause of action arose. Only Kentucky has held that the borrowing statute permits the *lex loci* to *lengthen* the limitation period of the forum's limitation statute.⁵ Thus, if the statute of limitation is five years in the forum in which the action arises, and only three years in the forum in which suit is started, Kentucky would not bar the action at four years, whereas the other jurisdictions would do so.

¹ *Maki v. George R. Cooke Co.*, 124 F. 2d 663 (C.C.A. 6th Cir. 1942); *Ley v. Simmons*, 249 S.W. 2d 808 (Ky. 1952); *Oliver v. Crewdson's Adm'r*, 256 Ky. 797, 77 S.W. 2d 20 (1934); *Smith v. Baltimore and Ohio Ry. Co.*, 157 Ky. 113, 162 S.W. 564 (1914); *Louisville & Nashville R.R. Co. v. Burkhart*, 154 Ky. 92, 157 S.W. 18 (1913); *Templeton v. Sharp*, 10 Ky. L. Rep. 499 (1889); *Connecticut Valley Lumber Co. v. Maine Cent. R.R.*, 78 N.H. 553, 103 Atl. 263 (1918); *Tieffenbrun v. Flannery*, 198 N.C. 397, 151 S.E. 857 (1930); 53 C.J.S. 970 (1948); 11 AM. JUR. 505 (1937); 75 A.L.R. 203 (1931); STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 147-148 (2d ed. 1951); GOODRICH, *CONFLICT OF LAWS* 240 (3rd ed. 1949); 63 HARV. L. REV. 1177, 1260 (1950).

² 63 HARV. L. REV. 1177, 1264 (1950); 9 U. OF CHI. L. REV. 723, 725 (1942); 149 A.L.R. 1224, 1237 (1944).

³ ALA. CODE tit. 7, sec. 37 (1940); ARIZ. CODE ANNO. c. 29, sec. 307 (1939); BURNS IND. STAT. ANNO. tit. 2, sec. 606 (1946); KY. REV. STAT. sec. 413.320 (1953); PAGE'S OHIO REV. ANNO. tit. 23, sec. 2305.20 (1953); WILLIAMS TENN. CODE ANNO. sec. 8607 (1934).

⁴ *Jenkins v. Thompson*, 251 S.W. 2d 325 (Mo. 1952); *Farthing v. Sams*, 296 Mo. 442, 247 S.W. 111 (1922); *Duggan v. Lubbin*, 226 N.Y.S. 238 (1927); *Isenberg v. Ranier*, 130 N.Y.S. 27 (1911); 53 C.J.S. 978 (1948); 11 AM. JUR. 511 (1937); 149 A.L.R. 1224, 1237 (1944); 75 A.L.R. 203, 231 (1931); Satter, *Limitations in Illinois: the Tolling and Borrowing Provisions*, 2 DEPAUL L.J. 225, 238 (1953); 63 HARV. L. REV. 1177, 1264 (1950).

⁵ *Gibson v. Womack*, 218 Ky. 626, 291 S.W. 1021 (1927); *Smith v. Baltimore & Ohio Ry. Co.*, *supra* note 1; *Shillito Co. v. Richardson*, 102 Ky. 51, 42 S.W. 847 (1897); *Burton v. Miller*, 185 F. 2d 817 (6th Cir. 1950).

Under the Kentucky borrowing statute before 1942, there was a requirement that both parties to the action had to be non-residents of Kentucky when the cause of action accrued, in order for the statute to be applicable.⁶ This meant that the statutes of limitation of the *lex fori* would apply where one or both of the parties was a Kentucky resident at the time that the action accrued.⁷ According to the court in the principal case, the only significant amendment to the statute in 1942 was the deletion of the non-residence provision with respect to causes of action arising in other states or countries.⁸ This meant, in effect, that Kentucky, in bringing its own residents within the statute, was abolishing the common law rule.

Although the court averred that there was no significant alteration of the borrowing scope of the statute, it might be argued that enough change was offered so as to indicate a need to follow the majority rule. In the old statute the key words were "When . . . an action can not be maintained thereon *by reason of the lapse of time*, no action can be maintained thereon in this state,"⁹ and in the new statute the borrowing words are "When . . . an action thereon *is limited to a shorter period of time* than the period of limitation prescribed by the laws of this state . . . , then said action shall be barred in this state *at the expiration of said shorter period*."¹⁰ (Italics supplied by writer.) In both statutes there are references to foreign statutes of limitation with *shorter* periods than Kentucky's. Thus, it seems reasonable to conclude that the first time the Kentucky court interpreted the statute to permit enlargement of the Kentucky limitation period, it was reading something *into* the statute.¹¹ Moreover, the 1942 statute contains the word

⁶ CARROLL'S KY. STAT. sec. 2542 (1936): "When a cause of action has arisen in another state or country between residents of such state or country or between them and residents of another state or country, and by the laws of the state or country where the cause of action accrued an action cannot be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this state."

⁷ Hoerter v. Garrity, 155 Ky. 260, 159 S.W. 815 (1913); Louisville & Nashville R.R. Co., v. Burkhart, *supra* note 1; Templeton v. Sharp, *supra* note 1; Labatt v. Smith, 83 Ky. 599 (1886).

⁸ *Supra* note 6. ⁹ 125 F. Supp. 333, 334-335 (1954).

¹⁰ Ky. REV. STAT. sec. 413.320 (1953).
¹¹ Shillito Co. v. Richardson, *supra* note 5, where, at page 53, 42 S.W. at 848, the court stated: "It would seem from the foregoing that if the action was not barred in such case by the statute of the State in which the cause of action accrued that it would not be barred in a controversy between the same parties in the courts of this State, and such seems to have been the opinion of the Superior Court of Kentucky as announced in Labatt, & Co. v. Smith & Whitney, 4 Ky. Law Rep., 358." But the Labatt citation used by the court was only of an abstract opinion. A complete opinion of the Labatt case appears in 4 Ky. Law Rep. 422, where, at 428 the court states: "In the first place it will be noticed that in no case do they enlarge the time within which the action is to be brought. The foreign statute is only to apply where the limitation is less than that mentioned in the Kentucky statute."

"shorter" at two different places, instead of the old usage of "lapse of time." Such seems to be a clear indication of legislative intention to limit the borrowing scope of the statute. The plain meaning of the words seems to limit its application, so that outside of this application the common law or *lex fori* should prevail. Such was indicated in *Farthing v. Sams*,¹² a 1922 Missouri case construing a similar borrowing statute *not* to enlarge the Missouri limitation, where the court asserted:

In order to apply the construction for which the plaintiff contends, it would be necessary to imply certain negative statements in the statute to the effect that, when a cause of action is *not* barred by the laws of the state in which it originated, the statute of limitations of this state cannot be applied in defense of the action.¹³ (Italics supplied by writer.)

Another case which seems to indicate that Kentucky ought to follow the majority rule on borrowing statutes is *Ley v. Simmons*,¹⁴ which, although construing a different but related statute, provides some strong dictum in line with the argument set out in the *Farthing* case. KENTUCKY REVISED STATUTE section 413.330, a borrowing statute that limits its application to foreign *judgments*, contains language almost identical with that found in the pre-1942 borrowing statute set out in the instant case.¹⁵ The court held the Kentucky statute should govern where the other state's statute of limitation is longer than Kentucky's, pointing out that "The Legislature has not said that if the action can be maintained in the other state it also can be maintained here."¹⁶ The court also added that such a holding is in accord with the great weight of authority, and said further "we think the rule is sound."¹⁷

The argument for the Kentucky interpretation of conflict of laws application of statutes of limitations must ultimately rest upon the contention that such statutes are really substantive, not procedural.¹⁸ The federal doctrine of *Erie v. Tompkins*,¹⁹ later clarified in *Guaranty Trust Co. v. York*,²⁰ indicated that substantial effect on the *outcome* of a case determines whether or not a law of a state is substantial or procedural. In the *York* case, Justice Frankfurter held that a federal

¹² 296 Mo. 442, 247 S.W. 111 (1922).

¹³ *Id.* 247 S.W. at 112.

¹⁴ *Supra* note 1.

¹⁵ "Action on judgment barred here if barred where rendered; exception. If, by the laws of any other state or country, an action upon a judgment or decree rendered in that state or country cannot be maintained there by reason of the lapse of time, and the judgment or decree is incapable of being otherwise enforced there, an action upon it may not be maintained in this state, except in favor of a resident thereof who has had the cause of action from the time it accrued."

¹⁶ *Supra* note 1, at 809.

¹⁷ *Id.* at 810.

¹⁸ 9 U. OF CHI. L. REV. 723 (1942); 28 YALE L.J. 492 (1919).

¹⁹ 304 U.S. 64 (1938).

²⁰ 326 U.S. 99 (1945).

court must follow the statute of limitations of the state in which it is sitting. "A right which can be enforced no longer by an action at law is shorn of its most valuable attribute."²¹ This manifestation of the substantive nature of such statutes is also supported by other statute of limitations problems. For example, where a statute creates a right which was not existent at common law and also limits the life of that right, the *lex fori* does not control.²² It is said that the condition is attached to and follows the right.²³ Some cases have even permitted *lex loci* control although the limitation upon the statutory right is contained only in a general statute rather than in a creating statute.²⁴ Furthermore, the extension of statutes of limitation will not revive a right, dead under the old statute.²⁵ Such also indicates that a statute of limitations affects more than the remedy.

Regardless of the possible contentions about the substantive nature of such statutes, the plain meaning of the language used in this statute, the construction of the parallel statute, and the vast majority of *contra* decisions in other jurisdictions seem to indicate the need for a new construction of the Kentucky statute in line with the majority rule. The adoption by the Legislature of new words presents an opportunity for the court to rest a new holding upon authority, in order to overcome the strength of *stare decisis*.

CHARLES RICHARD DOYLE

DEGREES OF NEGLIGENCE—NEGLIGENCE PER SE—EXCUSED VIOLATIONS OF ORDINANCE—Blackwell's administrator brought an action against the Union Light, Heat and Power Co. for wrongful death caused by negligence. The defendant's high tension wires, carrying 13,500 volts, extended across one end of a vacant lot where Blackwell was helping the operator of a crane. Blackwell was electrocuted while attempting to attach the cable of the crane to a bucket directly beneath the wires. The wires were uninsulated, thus violating an 1896 ordinance of the city of Newport which required all conducting wires except those for electric railways to be covered with durable weatherproof insulation of not less than two coatings. Held: Judgment for defendant was

²¹ 28 YALE L.J. 492, 496 (1919).

²² *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); *Order of Travelers v. Wolfe*, 331 U.S. 586 (1947); *Maki v. George R. Cooke*, *supra* note 1; *Wilson v. Massengill*, 124 F. 2d 666 (6th Cir. 1942); 9 U. OF CHI. L. REV. 723, 726 (1942).

²³ 9 U. OF CHI. L. REV. 723, 726 (1942).

²⁴ *Maki v. George R. Cooke*, *supra* note 1, *Contra: McDaniel v. Mulvihill*, 263 S.W. 2d 759 (Tenn. 1953).

²⁵ *Supra* note 23, at 725.